

224826
KARL MORELL

BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307
FACSIMILE 202-783-8947

kmorell@dc.bjllp.com

April 6, 2009

E-File

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

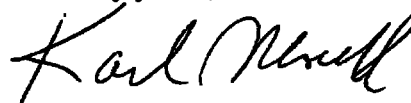
Re: STB Finance Docket No. 35164, BNSF Railway Company –
Petition For Declaratory Order

Dear Acting Secretary Quinlan:

Attached for e-filing is the Reply of BNSF Railway Company to the Motion
For Leave To Participate As A Party Of Record.

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35164

BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

**REPLY OF BNSF RAILWAY COMPANY TO MOTION FOR LEAVE TO PARTICIPATE AS
A PARTY OF RECORD**

Kristy D. Clark
General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 78131

Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for:
BNSF Railway Company

Dated: April 6, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35164

BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

REPLY OF BNSF RAILWAY COMPANY TO MOTION FOR LEAVE TO PARTICIPATE AS
A PARTY OF RECORD

BNSF Railway Company ("**BNSF**") hereby replies in opposition to the Motion For Leave To Participate As A Party Of Record ("**Motion**"), filed with the Surface Transportation Board ("Board") on March 17, 2009, by James Riffin ("**Riffin**").

Riffin seeks leave to participate in this proceeding for essentially two reasons neither of which has any merit. To date, Riffin has filed five forged pleadings containing false and fraudulent information in this proceeding. BNSF brought those forged filings, as well as others, to the attention of the Board in STB Finance Docket No. 35206, *Petition For Injunctive Relief* ("**FD No. 35206**"). Now that Riffin's forged filings have been exposed, he comes back to the Board shamelessly seeking leave to make more filings in his own name.

Riffin claims he needs to become a party of record in this proceeding because of "numerous disparaging remarks about Riffin" allegedly made by BNSF in the FD No. 35206 proceeding. Riffin's logic is flawed in at least three respects. First, the record in this proceeding

was closed November 6, 2008, and BNSF did not intend to make any additional filings.¹ Thus there is no need for intervention by Riffin. Second, the remarks Riffin finds “disparaging” were made in FD No. 35206 and should be addressed in that proceeding. Indeed, Riffin has already filed four pleadings in FD No. 35206 (three in the name of Edwin Kessler (“Kessler”) and one in his own name) addressing this same issue. Riffin fails to explain why he also needs to participate in this proceeding. Third, neither in the Motion nor in the four filings made by Riffin in FD No. 35206, does Riffin deny a single assertion made by BNSF in FD No. 35206. It was not BNSF’s intention to disparage Riffin but rather to bring to the Board’s attention a sampling of Riffin’s bad past behavior particularly in proceedings before the Board. The assertions concerning Riffin cannot possibly be “disparaging” since they are true.

Riffin also claims that on January 27, 2009, he became a prospective shipper on BNSF’s Chickasha Subdivision somewhere between Milepost 541.95 and Milepost 542.08, and thus “needs to become a party of record in order to protect his legal right to demand and receive rail common carrier service at this site.” Motion at 1. The segment of BNSF’s Chickasha Subdivision located between Mileposts 541.95 and 542.08, however, is not involved in this proceeding and any rail service to or from that segment would not be impacted by this proceeding. In his August 5, 2008, filing in this proceeding, Riffin falsely alleged that the relocation of the line located between Mileposts 540.15 and 541.69 (“Middle Segment”) would adversely impact service to Boardman, Inc. (“Boardman”) which is located to the west of the Middle Segment at Milepost 541.75. On November 6, 2008, Boardman withdrew from the proceeding having determined that it would be unaffected by the relocation of the Middle

¹ Although numerous filings have been made in this proceeding since November 6th, BNSF has chosen not to respond or file motions to strike since that would only engender countless more filings from Riffin and the various parties who wish to delay this proceeding in order to thwart a highway project in Oklahoma City, OK.

Segment located to the east of the Boardman facility. The segment of the Chickasha Subdivision located between Mileposts 541.95 and 542.08 is located even further to the west of the Middle Segment. Consequently, the relocation of the Middle Segment will have no impact whatsoever on Riffin.²

As previously noted, the record in this proceeding closed on November 6, 2008. The Board should not allow intervention at this late date when no additional filings are permitted. Permitting intervention by Riffin would also be a grave injustice since he has already filed five forged pleadings in this proceeding.

The Motion is without merit and, on that basis, should be denied. There are at least three additional reasons why the Motion should be denied.

The Board should not countenance Riffin's unethical behavior in this and other proceedings. BNSF requests that the Board take official notice of BNSF's Reply to the Petition For Injunctive Relief filed on February 17, 2009 ("**First Reply**") and BNSF's Reply to the Motion To Strike, Response and Motions To Impose Sanctions ("**Second Reply**") in the FD No. 35206 proceeding.

In the First Reply and Second Reply, BNSF identified numerous pleadings filed with the Board where Riffin forged the signature of Kessler and introduced false and fraudulent information. The Board should not sanction Riffin's behavior by permitting him to intervene in this proceeding. Instead, the Board should strike all pleadings filed in the name of Kessler in this proceeding.

² In the Motion, Riffin asserts that he purchased land adjacent to the Chickasha Subdivision between Mileposts 541.95 and 542.08. In FD 35206, Riffin claimed that the land had been purchased by Kessler. Riffin appears to be having increasing difficulties keeping his stories straight.

In the Second Reply, BNSF pointed out that Riffin has been found to be a “frivolous” litigant by two courts and has been sanctioned by those courts. BNSF also noted that the Board has cautioned Riffin on at least two occasions. Notwithstanding the Board’s admonitions, in the last two years Riffin has made at least 98 filings with the Board in his name and has forged the signature of Kessler on at least 24 occasions. BNSF suggests that, rather than permitting Riffin to intervene in a proceeding before the Board, the Board should appropriately sanction Riffin and prevent him from participating in Board proceedings.


Finally, it would be fundamentally unfair for the Board to permit Riffin to file one set of pleadings in the name of Kessler and another set of pleadings in the name of Riffin, particularly given Riffin’s annoying propensity of constantly changing the facts. To date, parties in this proceeding aligned with Kessler and Riffin have made totally incongruous arguments as to why the relocations at issue in this proceeding are not, as BNSF maintains, outside of the Board’s jurisdiction. For example, Riffin and Kessler argue that the relocations do not qualify because the relocation of the Middle Segment would adversely affect service to Boardman, which, of course, Boardman disputes. In Comments filed by Bio-Energy Wellness Center and North American Transportation Institute (collectively “Wellness Center”) on November 3, 2008, Wellness Center does not dispute BNSF’s contention that the relocations will not harm shippers or invade new territory. Instead, they claim that the construction of the rail line on the corridor of the Packingtown Lead was not a relocation of the Middle Segment but a reconstruction of the Packingtown Lead.³ This is only one example of conflicting argument and evidence introduced

³ The argument, of course, is absurd and illogical. Wellness Center essentially argues that BNSF has the managerial discretion to relocate the Middle Segment as long as it does not relocate that segment on the corridor of the Packingtown Lead because BNSF also has the managerial discretion to reconstruct the Packingtown Lead. Wellness Center cites no cases as to why the reconstruction of the Packingtown Lead trumps the relocation of the Middle Segment, because

by aligned parties in this proceeding. Inviting Riffin to file and his name and permitting him to continue filing in Kessler's name will only further exacerbate this problem and all but insure that this proceeding will have no end. Of course, that is one of Riffin's and Kessler's objectives in this proceeding.

In summary, BNSF respectfully urges the Board to deny the Motion. BNSF also urges the Board to impose appropriate sanctions against Riffin and Kessler. BNSF further urges the Board to issue a decision in this matter as expeditiously as possible. As noted by the Oklahoma Department of Transportation in its January 30, 2009 filing, work in the area of the Middle Segment must begin by March 2009 if the highway project is to be completed in a timely manner.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karl Morell", is written over a horizontal line.

Kristy D. Clark
General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 78131

Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorneys for:
BNSF Railway Company

Dated: April 6, 2009

there are none. BNSF management elected to relocate the Middle Segment because that segment needed to be relocated and BNSF management elected to relocate that line on the corridor of the Packingtown Lead because that was the least expensive alternative available.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply has been served on James Riffin and all parties of record by first class mail this 6th day of April, 2009.


Karl Morell